12 W. L. Bull. 286, 9 O. Dec. Reprint 396, citing St. Clair *v.* Orr, 16 O. St. 220; Fagin *v.* Cooley, 17 O. 44.

Under the statute which provides that where the adverse party is the executor or administrator of a deceased person, when the facts to be proved transpired before the death of such deceased person, the other party is incompetent to testify, it is held, that the deposition of a plaintiff, taken during the pendency of the suit, is not admissible on the trial when the defendant has since deceased. In the administration of justice, the admissibility, or competency, of a deposition must depend on the state of facts existing when it is presented for examination. Neville *v.* Hambo, 1 Disn. 517, 12 O. Dec. Reprint 768, citing Fagin *v.* Cooley, 17 O. 44.

Where a party to an action, being a nonresident of the county wherein the action is pending, causes his deposition in the case to be taken and filed, and afterward, and before trial the opposite party dies, and his personal representative is substituted in his place, such deposition is inadmissible in evidence on the trial, to the same extent as the oral testimony of the surviving party would be, if offered on the trial. St. Clair *v.* Orr, 16 O. St. 220.

In some states it is held that when a party to a suit has testified by depositions, and dies, the opposite may testify in his own behalf on matters referred to in the depositions, even before the personal representatives have introduced the depositions of their testator upon the trial. Coughlin *v.* Haeussler, 50 Mo. 126; Leahay *v.* Rayburn, 33 Mo. App. 55; Stone *v.* Hunt, 114 Mo. 66; Soble *v.* McClintock, 10 Ind. App. 562, 38 N. E. 74.

But the contrary has been held in other states Levy *v.* Dwihgt, 12 Colo. 103, 20 Pac. 12; Ivey *v.* Bondies (Tex. Civ. App.), 44 S. W. 196; Page *v.* Whidden, 59 N. H. 507; Kelton *v.* Hill, 59 Me. 259; Monroe *v.* Napier, 52 Ga. 385.

FLETCHER *v.* COMMONWEALTH.

Jan. 17, 1907.

[56 S. E. 149.]

1. Intoxicating Liquors — Offenses — Indictments — Violations of Revenue Law—Negativing License.—An indictment alleging that accused in a designated magisterial district unlawfully sold and delivered intoxicating liquors to a person named charges a violation of the revenue law prohibiting the sale of liquors without a license, within Va. Code 1904, § 4106, conferring on the circuit courts jurisdiction in cases of violations of the revenue law, though the offense was committed in a local option district.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 243, 244.]

2. Same—Designation of Purchaser of Intoxicating Liquors—Necessity.—An indictment charging an unlawful sale of intoxicating liquors need not name the person to whom the liquors were sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 238.]

3. Same.—An indictment alleging that accused in a designated

magisterial district unlawfully sold and delivered "intoxicating liquors and mixtures thereof" sufficiently charges a violation of Revenue Law, Acts 1904, p. 42, c. 20, § 141, forbidding the sale without a license of "wine, ardent spirits, malt liquors or any mixture thereof," and further providing that "all mixtures, preparations, and liquors (except pure apple cider) which will produce intoxication shall be deemed ardent spirits within the meaning of this section."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 230-233.]

4. Jury—Competency of Jurors—Prior Service.—Where one was tried by an impartial jury, the fact that members thereof had at the same term of court tried similar offenses proved by the same witnesses was not a ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 425-430.]

5. Criminal Law—Excessive Punishment.—A person was indicted for selling intoxicating liquors and charged with 16 distinct offenses. He was found guilty of all the offenses, and a fine of $200 for each offense was imposed. Held, that the aggregate fine was not excessive.

6. Same—Appeal—Review.—Where there was a demurrer to the indictment as a whole, and to each of the 16 counts thereof, and in the appellate court only the demurrer to the last count was relied on, the court will only consider the demurrer to that count.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3012.]

7. Intoxicating Liquors—Indictment—Sufficiency.—An indictment alleging in separate counts that accused, within 12 months last past, in a designated magisterial district, in a county named, unlawfully sold and delivered intoxicating liquors to a person named, stating in each count a different buyer, and containing one count without designating any buyer, is sufficient in its entirety.

Error to Circuit Court, Warren County.

Byrd Fletcher was convicted of unlawfully selling intoxicating liquors, and he brings error. Affirmed.

Byrd & Forsythe, for plaintiff in error.
The Attorney General, for the Commonwealth.

KEITH, P. An indictment was found against Byrd Fletcher in the circuit court of Warren county, at its September term, 1905, charging that he "within twelve months last past, in Front Royal magisterial district, in said county of Warren, Va., did unlawfully sell and deliver intoxicating liquors to I. A. Buck, to wit, 1 pint whisky, for fifty cents, against the peace and dignity of the commonwealth of Virginia." The first 15 counts are identical in form and substance, except that a different vendee is stated in

each one of the counts. The sixteenth count charges that "Byrd Fletcher, within 12 months last past, in said Front Royal magisterial district, in said county of Warren, did unlawfully sell and deliver intoxicating liquors and mixtures thereof, against the peace and dignity of the commonwealth of Virginia." This count only differs from those which precede it in that it fails to state the name of the person to whom the intoxicating liquors were charged to have been unlawfully sold.

The jury found Fletcher guilty on each of the 16 counts, and imposed a fine of $200 for each offense, making an aggregate of $3,200, upon which the circuit court gave judgment; and that judgment is now before us for review.

The first error assigned is as to the jurisdiction of the court; the contention being that the indictment was for violation of a local option law, and not the revenue law, and therefore does not fall within the exceptions contained in section 4106, Va. Code 1904.

That section provides: "The several police justices and justices of the peace, in addition to the jurisdiction exercised by them as conservators of the peace, shall have concurrent jurisdiction with the circuit courts of the counties and the corporation or hustings courts of the corporations of the state in all cases of violations of the revenue and election laws of the state, and of offenses arising under the provisions of chapter one hundred and eighty-seven, of sections thirty-eight hundred and one, thirty-eight hundred and two, thirty-eight hundred and three, and thirty-eight hundred and four of the Code of Virginia; and except when it is otherwise specially provided. shall have exclusive original jurisdiction for the trial of all other misdemeanor cases occurring within their jurisdiction in their respective magisterial districts, in all which cases the punishment may be the same as the circuit courts of the counties and the corporation or hustings courts of the corporations are authorized to impose."

The precise contention here is that the indictment does not charge a violation of the revenue laws of the state, within the meaning of this section, but that the offense charged is a violation of the local option law.

The indictment charges the unlawful selling of intoxicating liquors, and the situs of the offense charged appears to have been in a local option district, in which no license to sell liquor could be lawfully obtained, and in which, therefore, liquor could not be lawfully sold.

We do not perceive that the character and nature of the offense charged is affected by the fact that it was committed in a local option district. The charge is that the defendant did "unlawfully sell and deliver intoxicating liquors." If he did it unlawfully, whether with or without a license, he was guilty of an

offense against the law. That he also violated the local option law can have no influence upon the nature of the act. Webster's Case, 89 Va. 154, 15 S. E. 513. He has done that which the law says he shall not do without having first obtained a license, and it does not lie in his mouth to say: "It is true that I did not have a license; but the act was committed in a local option district, where it was impossible under the law to obtain a license."

It was forcibly urged by the Attorney General that no reason of public policy can be suggested why the court should be given jurisdiction of the offense of unlawful sale of intoxicating liquors where the sale takes place in a district where such traffic may be licensed, and denied such jurisdiction where committed in local option territory; and we concur with him in the view expressed that the unlawful sale of liquor in a local option district is "a more serious offense, more injurious to public morals, and a graver infraction of civic duty, than a sale in a license district without a license, for it is both a violation of the revenue law (that is, it is the conduct of a business free from any burden of taxation, which can be legally conducted only upon paying the taxes imposed upon it, and which others lawfully engaged in it pay), and it is a sale, also, in flagrant defiance of the law, sanctioned by the votes of a majority of the qualified voters of the community, which prohibits any such traffic, and not only makes it illegal, but criminal."

We are of opinion that the offense against the commonwealth here charged consists in the unlawful sale of intoxicating liquors; that it is none the less a violation of the revenue laws of the commonwealth because it happens that the offense charged was committed in a local option district; and it follows, therefore, that the circuit court has concurrent jurisdiction with the justices of the peace for the trial of such offenses.

The second error assigned is that the court overruled the demurrer to the sixteenth count of the indictment. The first objection made to that count is that it contains no averment of the person to whom the alleged sale was made.

No such averment is necessary. The gist of the offense is the unlawful sale, and the name of the person to whom it was made is immaterial.

In Dove's Case, 2 Va. Cas. 26, the syllabus states the law as follows: "It is not necessary, in an information for retailing spirituous liquors without a license, to name the persons to whom the liquors were sold." And this decision was followed in Hulstead's Case, 5 Leigh, 724, where it was held that an indictment need not name the person to whom the liquor was sold; and to the same effect is Commonwealth *v.* Smith, 1 Grat. 553.

The second objection to the sixteenth count is that it does not sufficiently charge the offense in the language of the statute.

The local option law (Va. Code 1904, § 587) forbids the selling of "any wine, spirituous or malt liquors or any mixture thereof." Section 141 of the revenue law (Acts 1904, p. 42, c. 20), forbids the sale without a license of "wine, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruit preserved in ardent spirits," and further provides that "all mixtures, preparation, and liquors (except pure apple cider) which will produce intoxication, shall be deemed ardent spirits within the meaning of this section." Now the averment of the sixteenth count is that the accused "did unlawfully sell and deliver intoxicating liquors and mixtures thereof," within said magisterial district, within twelve months last past, and this we think answers the test established in Young's Case, 15 Grat. 664, that "it is generally proper and safest to describe the offense in the very terms used by the statute for the purpose; but it is sufficient to use in the indictment such terms of description as that, if true, the accused must of necessity be guilty of the offense described in the statute. If the indictment may be true, and still the accused may not be guilty of the offense described in the statute, the indictment is insufficient."

The revenue law first gives an enumeration of the articles the sale of which is forbidden, naming among them "ardent spirits." It then gives a definition of ardent spirits, as embracing "all mixtures, preparations, and liquors (except pure apple cider) which will produce intoxication." The indictment uses the generic term "intoxicating liquors and mixtures thereof," which, interpreted by the statute, embraces all mixtures, preparations, and liquors (pure apple cider excepted) which will produce intoxication; so that we apprehend that it is impossible for the acts charged in the indictment to be true and the defendant be at the same time guiltless of the offense described in the statute.

It is charged as error that the court compelled the accused to be tried by a jury, members of which had sat in several cases against other parties, which were tried at the same term of court.

There is noted in the record an exception taken to the ruling of the court upon this point, but it does not appear to have been preserved by any proper bill of exceptions. It would not have availed the plaintiff in error if such had been the case, for there is nothing whatever to show that he was not tried by an impartial jury, and the mere facts that members of the panel had at the same term of the court tried similar cases proved by the same witnesses who testified against him does not of itself constitute error.

Objection is taken to the instructions given by the court. Those instructions must be interpreted in the light of the evidence. Plaintiff in error was the proprietor of a livery stable in the town of Front Royal, and operated a line of coaches be-

tween that town and the city of Winchester. The liquor charged to have been sold was always delivered at the livery stable in Front Royal; and one question in the case was as to where the contract of sale was made—whether it took place in the city of Winchester, or in the town of Front Royal—and it was to guide the jury in the determination of that question that the instructions in the case were given.

Taken as a whole, we think the instructions of the court correctly expounded the law, and could not have misled the jury to the prejudice of plaintiff in error.

It appears, further, that the court offered to instruct the jury that it was necessary for the commonwealth to prove the defendant guilty beyond all reasonable doubt, and every fact necessary to establish his guilt; but the attorney for the defendant stated to the court that no such instruction to the jury on the burden of proof was necessary or desired, and therefore none was given.

Another error assigned is that the court refused to set aside the verdict as contrary to the law and the evidence.

The evidence is sufficient to warrant the verdict of the jury. It tends to prove a systematic violation of the law, and leaves no doubt upon the mind that the accused, in person and by his agents, was guilty of almost innumerable offenses against the law.

It is insisted, also, that the fine imposed was excessive. Plaintiff in error was indicted for 16 distinct offenses. He was found guilty of them all, and a fine of $200 for each offense was imposed. We are unable to say that $200 is an unreasonable and excessive punishment for each one of the offenses charged. The aggregate is large, because plaintiff in error was an habitual law-breaker; and, if the penalty imposed for each offense was proper, plaintiff in error cannot be heard to complain of the aggregate which resulted from his continued and flagrant criminal misconduct.

In the circuit court there was a demurrer to the indictment as a whole, and to each count thereof; but in this court only the demurrer to the sixteenth count was relied upon, and therefore that alone is considered in the opinion. The authorities, however, are abundant to maintain the indictment in its entirety.

Upon the whole case, we are of opinion that there is no error in the judgment of the circuit court; and it is affirmed.

Note.

As the law of Texas relating to the sale of intoxicating liquors distinguishes between local option and other territory, as to the fine for selling without a license, an indictment for selling without a license should allege whether the sale occurred within or out of local option territory. Cousins *v.* State, 79 S. W. 549.

In the title Intoxicating Liquors, 23 Cyc. 232, the law is stated as

follows: "While it has been held in a number of cases that an indictment for an unlicensed or otherwise unlawful sale of liquor must set forth the name of the person to whom the sale was made, or, if the name is not known to the prosecutor or the grand jury, that fact must be stated as an excuse for not giving it, such an allegation is generally held to be unnecessary, so that an indictment which is otherwise sufficiently certain will not be quashed merely because it fails to name the purchaser of the liquor."

The second objection to the sixteenth count is that it does not sufficiently charge the offense in the language of the statute. It does seem strange that our prosecuting attorneys should experiment so often with that well-settled principle that it is always safer and better, in a prosecution for a statutory offense, to describe the offense in the indictment in the very language in which it is described in the statute.

Whilst it is true equivalent words may be used in lieu of the statutory description of the offense, yet it is dangerous as tending not only to material inaccuracy in substance, but also to irregularity in matters of form.

DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

HAMILTON *v.* STEPHENSON et al.

Nov. 22, 1906.

[55 S. E. 577.]

1. Mortgages—Deed of Trust—Foreclosure—Sale—Conduct.—A sale of land on foreclosure of a deed of trust was duly advertised, and ample opportunity afforded bidders to arrange in advance to purchase the property. The sale was attended by more than 200 persons, and commenced shortly before noon and continued for over 3 hours. One of the intending purchasers, after having failed to secure the co-operation of another, sought to have the sale which had already progressed more than 3 hours, suspended to enable him to endeavor to effect a similar arrangement with a third person. This was refused, but full time was afforded him to bid for the land individually or arrange with others to do so. As the bidding was drawing to a close, the trustee on two occasions took out his watch and instructed the auctioneer if no higher bid was made in 5 or 10 minutes, to knock down the land, which was then sold for its fair value. Held, that the land was not prematurely sold, so that bidders were deprived of an opportunity to purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1070, 1076.]

2. Same—Sale in Parcels.—In a proceeding to set aside a sale of